Supreme Court of the United States

OCTOBER TERM, 1945

No. 1187

BERTHA FRIEND, MIDDLE ATLANTIC TRANSPORTATION COMPANY and MILBURN MARTIN

Petitioners

vs.

FRED J. FRIEND

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF FRED J. FRIEND IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

I.

OPINIONS BELOW

The opinion of the United States District Court is reported 61 F. Supp. 101 and appears at pages 26-29 of the record in this case..

II.

JURISDICTION

The Judgment to be reviewed was entered on February 27, 1946 (R. 58).

The jurisdiction of this Court is invoked under Judicial Code, Section 240 (a) as amended by the Act of February 13, 1925.

III.

QUESTION PRESENTED

Can a United States District Court exercise jurisdiction if a defendant causes a third-party to be brought into a federal civil action under F. R. 14 to answer, along with it, to the plaintiff's claim, where the plaintiff and such third-party are citizens of the same State and federal jurisdiction does not otherwise exist?

IV.

STATUTE INVOLVED

The text of F. R. 14 on Third-Party Practice appears in the appendix (page 15).

V.

STATEMENT

Plaintiff and her husband, the third-party defendant live in Plainville, Connecticut and are both citizens of this State. She brought an action in the Connecticut State Court claiming damages for personal injuries sustained by her in a collision in Plainville, Connecticut between the automobile in which she was riding, operated by her husband, and a truck owned by the defendant, Middle Atlantic Transportation Company, a New York Corporation

and operated by the defendant, Milburn Martin (one of the petitioners), its servant and agent (record pages 4-6).

The defendants brought about the removal of this action from the State to the Federal Court on the ground of diversity of citizenship and then obtained an order for the citing of her husband as a third-party defendant pursuant to F. R. 14a. Thereafter, the plaintiff amended her complaint claiming that her injuries were also due to the negligence of the third-party defendant, her husband, and the latter filed what he termed "plea to the jurisdiction"—actually a motion to dismiss, F.R. 12(b)—on the ground that diversity of citizenship was lacking between himself and the plaintiff. The District Court denied his motion, 61 Fed. Supp. 101, record page 26-29. After trial the jury rendered a verdict against all the defendants in the sum of Six Thousand ($6,000.00) Dollars (record page 32).

The third-party defendant appealed to the Circuit Court of Appeals of the Second Circuit and the judgment in favor of the plaintiff was reversed as to the third-party defendant, Fred J. Friend, but was affirmed as to the other petitioners, the Court being of the opinion that the District Court could not exercise jurisdiction over the plaintiff's claim against the third-party defendant, because there was no diversity of citizenship between them and there being no other legal basis for jurisdiction of the Federal Court. This opinion appears in 153 Fed. 2nd. 778 and in this record at pages 55-58.

VI.

SUMMARY OF ARGUMENT

A. There is no diversity of citizenship between the plaintiff and her husband the third-party defendant.

B. In Connecticut there is no contribution between joint tort-feasors. Therefore, the defendants had no cause of action against the third-party defendant.

C. There is here no question of ancillary jurisdiction.

D. There is here no "separable controversy."

E. F. R. 82 says the rules do not extend the jurisdiction of the Federal Court. Neither does F. R. 14 as it is merely a procedural rule.

F. Before F. R. 14 will support a verdict there must be jurisdiction in the Federal Court based either on diversity of citizenship or some other legal basis.

G. The decision of the Circuit Court of Appeals in this case is not in conflict with any applicable decision of this Court.

VII.

ARGUMENT

I. POINT A: There Is No Diversity of Citizenship Between The Plaintiff And Her Husband The Third-Party Defendant.

Since the Plaintiff and her husband are both inhabitants in Plainville, Connecticut and are both citizens and residents of this State, there is no diversity of citizenship since they reside here together.

II. POINT B: In Connecticut There Is No Contribution Between Joint Tort-Feasors. Therefore, The Defendants Had No Cause Of Action Against The Third-Party Defendant.

In the case of James C. Sparrow vs. Edward Bromage, et al., 83 Conn. 27; 74 A. 1070, it was held by the Connecticut Supreme Court of Errors that there was no apportionment of responsibility and no right of contribution or indemnity between joint tort-feasors; they are all liable severally as well as collectively, and therefore, a verdict against two or more for an alleged tort may be set aside as to one or more of them in respect to whom it is against the evidence, and sustained as to the others.

So in the case of Fae Wise vs. Joseph E. Berger, et al., 103 Conn. 29; 130 A. 76, the Supreme Court of Errors decided similarly that in an action against joint tort-feasors a judgment against both may be collected, in whole or in part, from either, and no right to contribution between them exists; and, therefore, the only interest which one losing defendant has in a judgment against the other—and the only cause for complaint which a directed verdict in favor of the other affords him—lies in the tenuous hope that the plaintiff might elect to collect the judgment from that source.

So also Rose vs. Heisler, 118 Conn. 632; 107 A. 66.

III. POINT C: There Is Here No Question Of Ancillary Jurisdiction.

If any action is subordinate to an action legally in Court, that tribunal has jurisdiction since it may dispose of ancillary actions on matters. If a Federal Court has jurisdiction of the principal suit, it also has jurisdiction of any ancillary proceeding in that suit without regard to the citizenship of the parties, the amount in controversy or any other factor that would ordinarily determine jurisdiction.

CCA. N.Y. 1917 McCabe vs. Guaranty Trust Co. of N.Y. 243 F. 845.

CCA N.Y. 1919 Pell vs. McCabe, 256 F. 512 Modifying 254 F. 356. Cert. granted 249 U. S. 595 Affirmed 250 U. S. 573, 63 L. Ed. 1147.

Here, however, since the only possible action by the defendants is based on contribution and contribution is not allowed and since this is rather an independent suit, there is no possible action and therefore, no ancillary action.

The usual basis upon which jurisdiction over impleaded defendants has been upheld is that of "ancillary jurisdiction" that is jurisdiction to settle some claim ancillary to or in aid of a main claim admittedly within the federal jurisdiction. This was discussed at some length in Lesnik vs. Public Industrials Corp. 2 Cir. 144 Fed. 2nd. 968, and may well be resorted to where, for example, there is contribution between joint tort-feasors, and a defendant, separately sued, desires to obtain complete settle-

ment of the issues in one action. In Connecticut, however, as shown above there is no contribution between joint tort-feasors.

See Commentary, Impleader of Joint Tort-feasors, 4 Fed. Rules Serv. 900.

It appears then, that in this case, F. R. 14 has been used to extend jurisdiction so that the plaintiff has recovered against a citizen of the same state together with out-of-the-state citizens on a joint or concurrent claim upon which each is fully liable.

Precedents from other United States Districts must be examined with great care for there are at least six various legal situations, depending, also, in part upon differing state law, which may arise from litigation arising from an automobile accident. Willis, Five Years of Federal Third-Party Practice 29 Va. L. Rev. 981.

In view of the State law, this case would require an extreme extension of earlier jurisdiction concepts. Although there is much to be said for applying the concept of "ancillary" jurisdiction to the extent reasonably possible in order to get the procedural advantages of the rule, the more carefully discriminating authorities considering the possible situations have not supported its extension to cases like the present one.

> Willis: Five years of Federal Third-Party Practice, 29 Va. L. Rev. 981.
>
> Commentary, Federal Jurisdiction In Third-Party Practice 6 Fed. Rules Serv. 766.

2 Moore's Federal Practice, 1945 Cum. Supp. 356-358 citing cases.

See also Saunders vs. Baltimore & Ohio R. R. Co. D.C.S.D.W.Va., 63 Fed. Supp. 705 citing cases; Olsen vs. Jacklowitz 74 Fed. (2d) 718 (CCA 2nd 1935); Dollar SS. Lines vs. Merz 68 Fed. (2d) 594 (CCA. 9th 1934); Devost vs. Twin State Gas and Electric Co. 250 Fed. 349 (CCA 1st. 1918).

In the Second Preliminary Draft of Proposed Amendments to Rules of Civil Procedure, May 1945, Rule 14a and note thereto, this is the view taken by the Advisory Committee. It suggested a revision of F. R. 14 in order to eliminate the provision under which a defendant may, in effect, offer the Plaintiff an additional Defendant. This provision perhaps might suggest more in the way of single or consolidated adjudication of disputes than the limitations of Federal Jurisdiction permit or make possible.

IV. POINT D: There Is Here No "Separable Controversy."

The United States District Court suggested the possibility of using the idea of "separable controversy" as a springboard for jurisdiction. 61 Fed. Supp. 101, 102. If there is presented to the Court a separable controversy between citizens of different states it may be removed to the Federal Court and may thus carry the whole case along. 28 U.S.C.A. §71.

However, as the Circuit Court said whether or not that doctrine would afford the necessary springboard to justify a defendant in creating and carrying along a controversy between others who are citizens of the same state, it can have no application here. For, as the Court said, it seems quite clear that defendants who, as here, are charged with concurring acts of negligence and are freely joinable under state law cannot be considered actors in separate and separable controversies.

Pullman Co. vs. Jenkins 305 U. S. 534, 538.

Cheyne vs. Atchison, T.T.S. F.R. Co. 9 Cir. 125 Fed. (2d) 49.

Prescott vs Richards, D. C. Mass. 58 Fed. Supp. 10.

V. POINT E: F. R. 82 Says The Rules Do Not Extend The Jurisdiction Of The Federal Court. Neither Does F. R. 14 As It Is Merely A Procedural Rule.

Rule 82 states specifically that the Federal Rules are not to be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein.

The note which follows the Rules (see appendix) makes this point even clearer and stronger.

In other words, these rules give the parties no powers as to jurisdiction or venue which they did not have under Equity Rule 26 on Joinder of Causes of Action and Equity Rule 30 on Counterclaims.

"While joining a third person with the plaintiff in a counterclaim against them does not cure a defect in jurisdiction which would have existed had the counterclaim been pleaded against the plaintiff alone, the joinder may cause a defect which otherwise would not have existed. If there is diversity of citizenship between the plaintiff and defendant and the latter pleads a counterclaim entirely unrelated to the plaintiff's action, federal jurisdiction over the counterclaim nevertheless exists. But suppose that the defendant joins in the counterclaim a third person who is a citizen of the same state as the defendant, the counterclaim then does not satisfy the jurisdictional requirements and both the plaintiff and the third person may raise the objection."

Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure. 45 Yale L. J. 393 (1936).

VI. POINT F: Before F. R. 14 Will Support A Verdict There Must Be Jurisdiction In the Federal Court Based Either On Diversity Of Citizenship Or Some Other Legal Basis.

In view of the fact that the Federal Rules do not extend jurisdiction or venue of actions, no matter may be brought before a United States Court unless there exists either diversity of citizenship or some other legal basis already established which would give a Federal Court jurisdiction.

Judge Charles E. Clark who wrote the opinion in this case in the Circuit Court of Appeals wrote in the case of Brown vs. Cranston, 132 F. (2d) 631 (1942) 148 A.L.R. 1178 cert. den. 319 U. S. 741.

> "While Rule 14, unlike 193(2) of the New York Civil Practice Act, gives the defendant a right to bring in a third person 'who is or may be liable * * * to the plaintiff', in view of the decisions of the Supreme Court in Erie Co. vs. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 and Klaxon Co. vs. Stentor Electric Co. 313 U. S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477, *we do not feel justified in so construing this rule as to give the defendant a recovery which could not be obtained through any remedy available in the New York State Courts.* (Italics ours). To do so would attach a greater significance to the choice of the forum than those authorities would seem to sanction. Inasmuch as the original defendant in the case at bar could obtain no contribution in New York, if we held that Rule 14 governed, 'the accident of diversity of citizenship would * * * disturb equal administration of justice in co-ordinate state, and federal courts sitting side by side.' Klaxon vs. Stentor Electric Co. 313 U. S. 487, 496, 61 S. Ct. 1020, 1021, 85 L. Ed. 1477. Such a disposition would be contrary to the whole theory of Erie R. Co.. vs. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82L. Ed. 1188, 114 A. L. R. 1487.

> "In spite of the great convenience and advantage of applying Rule 14 in the present case we feel impelled to hold that we are precluded from doing this by the interpretation of the New York Statutes by its highest Court."

Judge Clark also wrote the opinion in Bates vs. Miller 133 F. (2d) 645 (1943) cert. den. 320 U. S. 210, where however, diversity of citizenship was complete between all the parties. There he said:—

> "That plaintiff chose originally not to make claim against these defendants became immaterial when he amended his complaint, as provided in Rule 14, to charge them with negligence. It is true that, as we have recently held, he is given the option, under the rather illusory New York law of contribution among joint tort-feasors, to decide whether or not to take a joint judgment, which is the only basis upon which contribution can be had and if he declines to accept as defendants those who have been cited in by his original adversary, the parties so impleaded must be dismissed. Brown vs. Cranston 2 Cir. Dec. 3, 1942, 132 F. 2nd 631. But here, unfortunately for appellants, plaintiff did accept the tender of additional parties, and the case is the same as if he had joined them originally."

In this case there is neither diversity of citizenship between the plaintiff and the third-party defendant nor any other legal basis which would give

the United States Court for the District of Connecticut jurisdiction of this matter since in Connecticut there is no right of contribution between joint tort-feasors.

VII. POINT G: The Decision Of The Circuit Court of Appeals In This Case Is Not In Conflict With Any Applicable Decision of This Court.

There is, of course, no decision that we have been able to find showing that this Court has ruled on the point in question. If it had its decision would be controlling.

There are various decisions in this Court such as those cited on page 7 of the Petitioners' Brief but these cases lay down rules which are well recognized but which are not in point in this case. We do not question the authority of a Federal Court to handle an ancillary matter but we claim that this case has nothing ancillary in it. We believe, however, that the decisions in this Court on related matters indicate the soundness of the rule laid down by the Circuit Court of Appeals for the Second Circuit.

This is borne out by the decision of this Court in Mitchell vs. Maurer, 293 U. S. 239. This Court said on page 243:—

> "Where the jurisdiction of a federal district court is based upon diversity of citizenship, proceedings therein in intervention being ancillary, the jurisdiction rests upon that of the main cause. Cincinnati I. & W. R. Co. vs. Indianapolis Union Ry. Co. 270 U. S. 107."

VIII.

CONCLUSION

In conclusion, your Respondent respectfully claims that since there is no contribution in Connecticut, no diversity of citizenship, no question of ancillary jurisdiction, no separable controversy and no other legal basis for giving the United States Court of Connecticut jurisdiction over the Respondent, the Petition for a Writ of Certiorari should be denied.

Respondent, Fred J. Friend

By Charles H. Blackall

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